Filed 5/18/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DION RONNELL FULTON, Defendant and Appellant.	C065057 (Super. Ct. No. 08F09234)

APPEAL from a judgment of the Superior Court of Sacramento County, Gary S. Mullen, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Ivan P. Marks, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II through V.

The 28-year-old defendant Dion Ronnell Fulton raped his 14-year-old stepsister. Convicted of rape and lewd conduct and sentenced to eight years in state prison, the defendant appeals.

On appeal, the defendant contends the trial court erred by: (1) denying his motion to suppress evidence seized from his penis without a warrant, (2) limiting cross-examination of a criminalist, (3) denying the defendant's objection to DNA evidence based on chain of custody and refusing to instruct the jury on the chain of custody, and (4) giving two otherwise proper jury instructions too close together. He also contends that (5) the cumulative effect of errors requires reversal.

In the published portion of this opinion, we conclude that the trial court erred by denying the motion to suppress; however, we find the error harmless beyond a reasonable doubt. In the unpublished portion of the opinion, we conclude that the defendant's remaining contentions are without merit. Therefore, we affirm.

FACTS

In July 2008, D. was 14 years old. The defendant, who is 14 years older than D., is her stepbrother. D. lived in Elk Grove and the defendant in Sacramento, with his wife and three children.

On July 15, 2008, the defendant picked up D. at her house in the afternoon to babysit the defendant's children at his house. That evening, the children, as well as the defendant's wife, went to bed, and D. watched television in the family room,

lying on the couch. The defendant was sitting at the computer nearby.

The defendant approached D. on the couch and began tickling her, which he had done on earlier occasions. This time, however, the defendant began touching her chest and her buttocks. She told him to get off her, but he told her to be quiet. When she tried to get up, he grabbed her arm and told her to just go to sleep.

The defendant put his hand down D.'s pants and touched her vagina. He pulled her pants down, laid down behind her, and put his penis in her vagina. D. did not call out for anyone or try to get up because she was scared.

The defendant heard his daughter call for him from her bedroom, and he jumped up off the couch. D. pulled up her pants, and stood up. The defendant went to his daughter's bedroom, and D. went into a bathroom.

In the bathroom, D. called her boyfriend, but did not tell him what was wrong. She urinated and wiped herself.

D. left the bathroom, went into one of the bedrooms, and again called her boyfriend. This time she told him generally what had happened. The boyfriend encouraged D. to call her mother. After she finished her call to her boyfriend, D. called her mother and told her what had happened. Her mother yelled at her. These calls were made after one o'clock in the morning of July 16, 2008.

D. went back into the bathroom and locked the door. The defendant's wife knocked on the door of the bathroom, and D. let

her in. The defendant's wife spoke on the phone to D.'s mother, and D.'s mother asked the defendant's wife to bring D. home. The defendant's wife yelled at D. and asked D. what had happened, but D. did not respond.

The defendant and his wife took D. home. Nothing was said in the car, but, when they arrived at D.'s home, her mother grabbed her and hugged her, and the defendant kept saying he was sorry.

About 20 minutes after D. arrived home, her mother took her to UC Davis Medical Center. Once there, D. told a police officer what had happened. She also lied, telling the officer she had not had sex with her boyfriend for several months when she actually did two days before. She lied because she knew her mother would be angry if she found out about it.

A nurse conducted a rape examination on D., gathering evidence on swabs. She did not observe any injuries. The nurse also collected D.'s clothing.

Police officers arrested the defendant between five and six o'clock that same morning. At the jail, he was taken into a room where pubic hair was collected and swabs were taken of his penis. His clothing was also collected.

Criminalist Jeffrey Herbert tested the collected evidence. On the swabs of the defendant's penis, he found DNA from both the defendant and D. He found sperm on D.'s underwear, but he was unable to get a DNA sample from the sperm.

Later, criminalist Kristie Abbott retested the penile swabs and the underwear. She also found the defendant's and D.'s DNA

on the penile swabs. She was able to get DNA samples from D.'s underwear and found both the defendant's and D.'s DNA.

The defense was that there was no sexual act and D. was lying. The defendant attempted to discredit D.'s testimony by showing discrepancies in her statements.

The defendant's wife testified that she did not hear her daughter call out to the defendant in the night. When the defendant's wife approached D. in the bathroom, D. told her that the defendant had touched her leg and she wanted to go home. When they got to D.'s house, the defendant's wife did not hear the defendant apologizing.

The officer who initially interviewed D. did not recall D. saying that the defendant had touched her chest or breasts or that he had grabbed her arm, although she told the officer that defendant held her by the shoulders and that she elbowed the defendant two or three times. The nurse who performed the rape examination testified that D. reported that the defendant did not grab her or hold her. However, D. told the nurse that she had elbowed the defendant and that he had bitten her right shoulder. There was no mark on her shoulder.

Later, a detective questioned D., who stated that when the defendant grabbed her, she elbowed him and told him to stop. She did not mention that defendant touched her breasts. There were also some discrepancies between phone records and D.'s statements concerning when she said she called her boyfriend and mother after the assault.

The defendant presented testimony that DNA can be transferred easily, such as by speaking, sneezing, coughing, and so forth. Wet items, such as damp clothing, transfer DNA more easily, although dry items can also transfer DNA. There was evidence that D. would sometimes borrow the defendant's basketball shorts to swim at his house. There was no evidence that she borrowed the defendant's shorts on the day before the assault. D. also used the bathroom and shower at the defendant's home at times and used the family's bath towels. The defendant's wife testified that she and the defendant sometimes had sex on the couch in the family room, although she could not remember when was the last time that had occurred.

PROCEDURE

A two-count information charged the defendant with rape (Pen. Code, § 261, subd. (a)(2); count one) and a lewd act on a 14-year-old by a defendant at least 10 years older (§ 288, subd. (c)(1); count two). A jury convicted the defendant on both counts.

The trial court sentenced the defendant to the upper term of eight years in state prison for the rape and a concurrent middle term of two years for the lewd act.

DISCUSSION

I

Motion to Suppress

The defendant contends that the evidence seized from his penis without a warrant should have been suppressed because the seizure violated the Fourth Amendment. The Attorney General

responds that the seizure did not violate the Fourth Amendment because it was incident to arrest and justified by exigent circumstances. We agree with the defendant that the warrantless seizure violated the Fourth Amendment and the evidence should have been suppressed. However, we find any error in this regard harmless beyond a reasonable doubt.

The evidence submitted at the hearing on the defendant's motion to suppress was based on a stipulation. That unwritten stipulation, as related to the court by the prosecutor and agreed to by defense counsel, included the following facts:

- The defendant was at the county jail.
- The defendant was taken to a private room with the arresting officer and a female nurse.
- The officer stood in front of the window in the door, the only window in the room.
- The defendant pulled down his pants far enough to expose his genital area.
- The nurse combed his pubic hair and wiped the outside of his penis with a swab. (If there were a foreskin, it would have been pulled back. However, there is no evidence concerning whether the defendant was circumcised.)
- The swab was put in a rape kit and turned over to the officer.
- The evidence was seized because the defendant had been arrested for rape and the victim had alleged that he penetrated her vagina with his penis.

- The alleged rape occurred around midnight, the defendant was arrested about 4:00 or 4:30 that morning, and the evidence was seized at approximately 6:50, two or more hours after he was arrested.

While this was the extent of the stipulation, the prosecutor and defense counsel argued the motion based on much more than the facts in the stipulation. The prosecutor argued that such biological evidence is "tenuous at best. It naturally wears off and could intentionally be taken off as well." He thought that the evidence could be rubbed off onto the defendant's pants. Defense counsel argued that it had not been established that the DNA evidence was dissipating. In the previous case that he had tried, a swab of DNA evidence had been preserved for 20 or 30 years. He did not believe that the defendant could have destroyed the DNA evidence without having access to his penis with his hands, which were probably handcuffed.

The trial court thought that perhaps such evidence is similar to gunpowder residue, which can be washed or brushed off. The court wondered whether the evidence would degrade in a moist area such as the crotch.

After further nonevidentiary ruminations by counsel and the court, the trial court denied the motion to suppress and allowed admission of the seized evidence.

The Fourth Amendment forbids unreasonable searches and seizures. (*Terry v. Ohio* (1968) 392 U.S. 1, 9 [20 L.Ed.2d 889, 898-899].) "The overriding function of the Fourth Amendment is

to protect personal privacy and dignity against unwarranted intrusion by the State." (*Schmerber v. California* (1966) 384 U.S. 757, 767 [16 L.Ed.2d 908, 917].) Unless the warrantless search or seizure falls within one of the exceptions to the warrant requirement, such as exigent circumstances, it is unreasonable. (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 474-475 [29 L.Ed.2d 564, 588].)

The prosecution bears a heavy burden of demonstrating that the circumstances justified the warrantless search or seizure. (*Vale v. Louisiana* (1970) 399 U.S. 30, 34 [26 L.Ed.2d 409, 413].) In carrying that burden, the prosecution must produce specific, articulable facts that, together with reasonable inferences from the facts, reasonably establish the need for the warrantless intrusion. (*Terry v. Ohio, supra,* 392 U.S. at p. 21.)

The threat that evidence will be destroyed or lost before the officer can obtain a warrant is a valid exigent circumstance justifying an officer's immediate seizure of the evidence. (See *Cupp v. Murphy* (1973) 412 U.S. 291, 296 [36 L.Ed.2d 900, 906] [seizure of defendant's fingernail scrapings was constitutional because defendant may have been trying to destroy evidence while at the station].)

Here, the seizure of the evidence from the defendant's penis is problematic. It involved a major intrusion on the defendant's dignity. There is a dispute in authority about the extent to which *on proper showing* the police can search intimate areas of an arrestee's person. (3 LaFave, Search and Seizure

(4th ed. 2004) Post-Arrest Detention, § 5.3(c), pp. 168-170 & fns. 114, 116; *id.* 2011-2012 Supp., p. 32.) Yet the prosecution, bearing the burden of justifying the warrantless seizure, made no attempt to establish that the evidence would have been destroyed absent the warrantless seizure. At best, the People want us to assume that such is the case. That is no way to justify a warrantless seizure of evidence.

The stipulated facts established only what happened -- evidence was taken from the defendant's penis without a warrant. The prosecution did not put on evidence concerning the destructibility of the evidence or even that the police had a good-faith belief, or any kind of belief, that the evidence could be destroyed absent the warrantless seizure. (See *Schmerber v. California, supra,* 384 U.S. at pp. 770-771 [reasonable belief that evidence would be destroyed may justify warrantless seizure].) It should go without saying that the attorneys' arguments were not evidence. (See CALCRIM No. 222.) Therefore, we are left with a request by the Attorney General to condone a warrantless seizure based on speculation or supposition.

The Attorney General's argument that this was merely a search incident to arrest does not fare any better. Seizure of evidence from an arrestee's genitalia is a major intrusion on the arrestee's dignity. To seize evidence from a person's genitalia, as part of a search incident to arrest and without a warrant, there must be an exigency justifying the seizure, such as officer safety or imminent destruction of evidence. (See

Schmerber v. California, supra, 384 U.S. at pp. 770-771; see also *State v. Lussier* (Minn.Ct.App. 2009) 770 N.W.2d 581, 589-590.) As noted, there was no such showing here.

While we cannot agree with the Attorney General that the warrantless seizure of evidence from the defendant's penis was justified, we also disagree with the defendant that this must result in reversal of the judgment against him. Any error in admitting the evidence obtained from the defendant's penis was harmless beyond a reasonable doubt considering the credibility of the victim and the evidence obtained from the victim's underwear.

When a trial court improperly denies a motion to suppress, we must reverse the judgment unless the error was harmless beyond a reasonable doubt, considering the evidence properly admitted. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]; *People v. Neal* (2003) 31 Cal.4th 63, 86.)

There was (1) ample evidence to support D.'s allegation that the defendant had raped her and (2) no challenge to D.'s credibility that would have convinced a reasonable jury to disbelieve her, considering all the evidence. While the defendant argued that there were inconsistencies in D.'s testimony, there was no plausible evidence that D. had a motive to lie. D. and the defendant had a good familial relationship. Thus, there appears to be no good reason D. would have lied about the defendant raping her. The jury obviously found D. to be a credible witness, and it is unlikely that the exclusion of the penile swab evidence would have changed that.

Furthermore, this was not a simple he-said-she-said case. Disregarding the evidence of D.'s DNA on the defendant's penis, D.'s rape allegation was supported by the presence of the defendant's DNA in sperm on D.'s underwear. The defendant presented evidence concerning transfer of DNA, but only bare speculation supports the view that the defendant's DNA somehow got deposited on D.'s underwear by some means other than the rape.[1]

Because the jury would have convicted the defendant even without the evidence collected from his penis, any error in denying the defendant's motion to suppress the evidence was harmless beyond a reasonable doubt. We therefore reject the defendant's contention that his conviction must be reversed for violation of the Fourth Amendment.

II

Limitation of Cross-examination

A strategy of the defense at trial was to convince the jury that the items bearing DNA evidence had possibly been contaminated such that DNA was transferred among the items of evidence. The defense desired to question a criminalist who had originally tested the items concerning prior lab mistakes and negligence. The prosecution moved in limine to prevent the defense from questioning the criminalist concerning the

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[1] The defendant made no challenge, either here or in the trial court, to the collection of the blood (DNA) sample. Therefore, we presume its collection did not violate the Fourth Amendment.

specifics of prior mistakes or negligence, and the trial court granted the motion. The court reasoned that, because the prior mistakes and negligence did not involve contamination of samples, the confusing nature of the testimony and undue consumption of time that the admission of the evidence would entail outweighed the probative value of the evidence. The court concluded that the evidence should be excluded pursuant to Evidence Code section 352.

On appeal, the defendant contends that the exclusion of the evidence under Evidence Code section 352 was an abuse of discretion and that it also violated his constitutional rights to present a defense and to confront a witness. The contentions are without merit.

Background

The prosecution filed a motion in limine to prohibit the defense from questioning criminalist Herbert concerning two prior cases he handled: People v. Armstrong and People v. Smith.

In People v. Armstrong, a sexual assault case, Herbert collected possible DNA evidence from a car in which the assault occurred, but he failed to write a report and follow protocol in booking the evidence. Years later, the evidence collected by Herbert was discovered and tested, rendering a DNA profile consistent with the defendant in that case.

In People v. Smith, another sexual assault case, evidence was collected that may have been a mix of the DNA of the victim and the defendant. Herbert performed tests on the evidence and,

applying a flawed statistical analysis, concluded that it was highly likely that DNA in the mixture was from the defendant. Later, Herbert applied a different statistical analysis that rendered results much more favorable to the defendant; however, Herbert did not reveal the results of the second analysis until trial.

In addition to the evidence concerning the prior cases, it came to light that Herbert was no longer allowed to work on DNA evidence and that the evidence in cases he worked on is being retested.

The trial court held a hearing on the motion, at which Herbert testified. The prosecution argued that the defense should be prohibited from questioning Herbert concerning these two cases because they did not involve contamination of the DNA evidence, which is the claim in this case. The defense asserted that it had the right to impeach Herbert with his failures to follow protocol because it went to his reliability as a custodian of the evidence, even if he would not testify that he had failed to follow the proper protocols in this case and the other cases did not involve evidence contamination.

The trial court first ruled that evidence concerning any discipline imposed on Herbert or the retesting of the evidence he worked on in other cases would be excluded. The court found the evidence concerning any kind of contamination in this case was weak.

Concerning People v. Armstrong, the court recognized that Herbert failed to follow the laboratory's protocols, but there

was no issue of evidence contamination. Because of the dissimilarity, consumption of time for admission of evidence concerning the People v. Armstrong case was not justified.

Concerning People v. Smith, the court noted that it involved statistical measures, not handling of the evidence. Therefore, it had little probative value.

The trial court therefore granted the prosecution's motion to prohibit the defense from cross-examining Herbert concerning the prior cases, applying Evidence Code section 352. In the end, however, the trial court stated that it would allow the defense to ask Herbert whether, in handling prior cases, he had made errors, but it would not allow a protracted examination into the two prior cases.

Evidence Code section 352

"'[W]hen an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. [Citation.] On appeal, the ruling is reviewed for abuse of discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

For the most part, the defendant, on appeal, reiterates his trial court arguments concerning the relevance and importance of the evidence concerning Herbert's handling of the prior cases. However, we agree with the trial court's careful Evidence Code section 352 analysis and conclusion: Herbert's errors in prior

cases did not provide a strong basis for an inference that he contaminated the evidence in this case because those prior cases did not involve evidence contamination.

Still, the defendant persists, arguing: "Here, when coupled with other defense evidence showing the range of lab practices which could cause contamination or transference, the evidence of Herbert's misfeasance on several occasions when working in the lab provided a link in a chain of inferences which tended to raise reasonable doubt about, and therefore disprove, the integrity of the biological evidence." While this may establish the relevance of the evidence, it does not establish the strength of the evidence to support the desired inferences such that we could conclude that limiting the cross-examination was an abuse of discretion.[2]

Constitutional Arguments

The defendant's constitutional arguments also fail to persuade us that the trial court erred by limiting cross-examination of Herbert.

A criminal defendant has a due process right "to present all relevant evidence of significant probative value to his or her defense. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999, italics omitted.) However, in general,

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[2] Because we conclude that the trial court did not abuse its discretion in limiting cross-examination under Evidence Code section 352, we need not consider the defendant's argument that the evidence of Herbert's unrelated misfeasance was admissible under Evidence Code section 1101.

application of the ordinary rules of evidence, such as Evidence Code section 352, does not infringe on a defendant's right to present a defense or cross-examine witnesses. (*Id.* at p. 998.) Although completely excluding evidence supporting an accused's defense could rise to the level of a due process violation, the rejection of some evidence concerning the defense does not. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, the trial court did not completely exclude evidence of the defense. To the contrary, Herbert's handling of the evidence was explored in detail, and the defense elicited testimony from him concerning errors in prior cases, though not with the specificity the defense desired. Under these circumstances, and the proper application of Evidence Code section 352, the court's ruling did not violate the defendant's constitutional rights to present a defense or confront a witness.

III

Chain of Custody Issues

The defendant makes two contentions concerning the chain of custody of the DNA evidence admitted in this case. First, he contends the trial court erred by denying his objection to the evidence based on the chain of custody. And second, he contends the trial court erred by rejecting his proposed instruction to the jury concerning the chain of custody. Each contention is without merit.

A. *Admission of DNA Evidence over Chain of Custody Objection*

"The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight. [Citations.]" (*People v. Riser* (1956) 47 Cal.2d 566, 580-581, disapproved on another ground in *People v. Chapman* (1959) 52 Cal.2d 95, 98.)

The abuse of discretion standard of review applies to a trial court's ruling on a party's motion to exclude evidence based on an insufficient showing of chain of custody. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

A review of the evidence reveals that the prosecution established the chain of custody and the trial court did not abuse its discretion in admitting the evidence.

We recount separately the DNA evidence collected from D. and from the defendant.

Nurse Sheridan Miyamoto performed the rape examination on D. at about 2:30 a.m. on July 16, 2008, the morning of the assault. The nurse took vaginal, cervical, and perineal swabs. She dried the swabs, then placed them in individual envelopes. She also took a pubic hair sample and a blood sample, which were also similarly deposited in separate envelopes. This evidence obtained from D., the rape kit, become exhibit 28 at trial. Separately, D.'s underwear and outer clothing were deposited in a box. Everything was in a sealed condition when Miyamoto delivered the evidence to the crime lab.

Criminalist Herbert broke the seal on the rape kit on October 17, 2008. Herbert performed tests on the various swabs, returning each to its own envelope. When he was finished with the testing he resealed the rape kit, but he was not sure whether he did it "that very day."

Criminalist Kristie Abbott unsealed the rape kit on September 1, 2009. She retested the evidence and put each item back in its own envelope, but she did not reseal at that time because she intended to do additional testing.[3]

As for the evidence taken from the defendant, phlebotomist Randi Evenson collected penile swabs, pubic hairs, and a blood sample from the defendant at about 6:50 a.m. on July 16, 2008, put them in individual, sealed envelopes, and sealed them in a

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[3] It is irrelevant whether Abbott resealed the envelopes at this point because there was no evidence of later testing.

suspect kit that became exhibit 29 at trial.[4] She turned the kit over to the officer who accompanied the defendant.

Herbert broke the seal on the suspect kit on October 17, 2008, and tested the contents. He did this testing on the suspect kit in a work area different from where he did the testing of the rape kit. The next day, he tested the blood samples from D. and the defendant. The record does not reflect when Herbert sealed the suspect kit.

Abbott opened the suspect kit on September 9, 2009, and tested the contents over the course of the next few days. She did not testify expressly that the kit was sealed when she received it, only that she opened it and wrote her initials and the date on the box. Earlier, she had testified that when she breaks a seal to open an evidence box she writes her initials and the date.

Focusing on the times when the rape kit and suspect kit may have remained unsealed, the defendant claims that there is "considerable doubt about whether the DNA evidence was stored and managed while at the crime lab in a manner which would reasonably ensure it remained free from potential alteration, substitution or tampering." We disagree. Only bare speculation supports a conclusion that someone tampered with the DNA

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[4] We have already concluded that the evidence collected from the defendant's penis should have been suppressed because of a violation of the Fourth Amendment but that admitting it was not prejudicial. Accordingly, even if we were to conclude that this evidence was improperly admitted over the chain of custody objection, the error in this regard would also be harmless.

evidence or that, left unsealed, it somehow was contaminated. Therefore, the trial court was correct in ruling that it was proper to admit the evidence and let what doubt remained go to its weight. (*People v. Riser, supra,* 47 Cal.2d at pp. 580-581.)

B. *Proposed Jury Instruction on Chain of Custody*

The defendant proposed a special jury instruction that would have required the jury to find an intact chain of custody before considering the DNA evidence. The instruction tracked rather closely the law that the trial court applies in determining the admissibility of the evidence. The court rejected the proposed jury instruction because the jury's determinations concerning the chain of custody go to the weight of the evidence, not the admissibility of the evidence. The court concluded that the instruction was argumentative and confusing and that it misstated the law.

On appeal, the defendant contends that the trial court erred by not giving the proposed special instruction. The contention is without merit.

The defense proposed the following jury instruction:

"Evidence of the analysis of blood and hairs or fibers or similar evidence recovered from a crime scene may not be considered until you first determine the evidence was preserved in an unaltered and unchanged condition from the time of its seizure at a crime scene until the time it was analyzed. This requirement, the purpose of which is to prevent contamination of or tampering with evidence, is known as the 'chain of custody' requirement. Only if you determine that a reasonable chain of

custody was accounted for may you then consider the results of any analysis or testing of such evidence. Unless a reasonable chain of custody of such evidence was established, however, you must disregard such evidence and not consider it for any purpose."

The trial court noted that the instruction was misleading because it directed the jury not to consider the DNA evidence if the evidence was altered or changed in any way. The swabs, however, were dried and subjected to various chemical testing. The proposed instruction gave no guidance concerning such testing. Therefore, the jury would be constrained to disregard the evidence for improper reasons. Instead of disregarding the evidence, the jury should be required to determine how such alterations or changes affected the weight of the evidence. The court also found that the instruction was argumentative and confusing, as well as being contrary to the law.

The court acted properly in leaving to the jury the task of determining how much weight to give the DNA evidence, taking into account the chain of custody evidence. Specifically, the proposed instruction was misleading because it would have directed the jury that it could not consider the DNA evidence unless it found that the evidence was in "an unaltered and unchanged condition from the time of its seizure at a crime scene until the time it was analyzed." This is problematic for two reasons: (1) there was no evidence seized at the crime scene and, more importantly, (2) the testimony established that the DNA evidence was dried and then tested more than once in

procedures that, at least to some extent, altered or changed the condition of some of the evidence. At trial, defense counsel appears to have agreed that the instruction, as written, may not have been completely accurate in that regard because counsel said that he was "open to modifying this to allow various nuances that the Court thinks would make it comport with the law of chain of custody . . . ." Yet the defendant has offered no modification, either at trial or on appeal, that would make the instruction comport with law. Accordingly, the trial court did not err by refusing the proposed instruction.

IV

Jury Instructions

The defendant contends that the trial court erred when it instructed the jury using CALCRIM Nos. 1190 and 301 too close together. Although he acknowledges that the California Supreme Court, in *People v. Gammage* (1992) 2 Cal.4th 693, approved of giving the earlier equivalents of both instructions (CALJIC Nos. 10.60 and 2.27) and he also acknowledges that the new CALCRIM instructions have essentially the same effect as the CALJIC instructions, he claims that the trial court erred by giving them because it gave them together, rather than separated by other instructions. The argument is unpersuasive.

As given, the instructions stated: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all of the evidence. [CALCRIM No. 301.] [¶] Conviction

of a sexual assault crime may be based on the testimony of a complaining witness alone. [CALCRIM No. 1190.]"

Concerning the predecessors of these two instructions, the Supreme Court explained: "Although [CALJIC Nos. 2.27 and 10.60] overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. *It is given with other instructions advising the jury how to engage in the fact-finding process.* CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. *It is given with other instructions on the legal elements of the charged crimes.*" (*People v. Gammage, supra,* 2 Cal.4th at pp. 700-701, italics added.)

Focusing on the language that we have italicized, the defendant asserts that the holding in *Gammage* approving the use of both instructions requires that the two instructions be separated. He argues that, if the two instructions are given together, "a juror would be apt to construe the instructional combination -- advising it to review carefully the testimony of a single witness for purposes of proving any fact and yet permitting it to convict solely on the testimony of the complaining witness -- as tending to elevate the trustworthiness of the complainant above those of all other witnesses, including the defendant in cases where he or she testifies."

We disagree. As *Gammage* noted, both instructions are proper statements of the law. We see no reason why they must be given at separate times during the charge to the jury. While *Gammage* noted their independent, though overlapping, purposes in apprising the jury of the applicable law, the court did not require that they be given at separate times. Accordingly, the defendant's contention is without merit.

V

Asserted Cumulative Error

The defendant contends that the errors were cumulatively prejudicial even if they were not so individually. To the contrary, the lone error was in not suppressing the evidence taken from the defendant's penis, and that error was harmless.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

I concur:

BUTZ, J.

Concurring and Dissenting Opinion of Duarte, J.

I respectfully dissent.

I agree with the majority that the trial court should have granted defendant's motion to suppress the evidence flowing from the penile swab. Some cases suggest that a trial court can infer exigency regarding the need to conduct a penile swab, when an arrestee is charged with a recent sexual assault. (See, e.g., *Ontiveros v. State* (Tex.App. 2007) 240 S.W.3d 369, 371-372 ["even while handcuffed, appellant could have urinated in his pants and thereby damaged the fragile DNA evidence"].) However, I agree with the majority that the better view is that the People must either obtain a warrant to conduct such an invasive search, or be prepared to produce *evidence of exigency* to justify a warrantless swab at a later suppression hearing. (See, e.g., *State of Minnesota v. Lussier* (Minn.App. 2009) 770 N.W.2d 581, 589-590.) In this case, *no* evidence was produced at the suppression hearing showing that there was any risk that evidence on defendant's penis would be contaminated or would degrade in the time it would have taken to obtain a warrant.

However, I disagree with the majority that the error was *harmless beyond a reasonable doubt*. (See *People v. Tewksbury* (1976) 15 Cal.3d 953, 970-972; *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705.] (*Chapman*).)

This court has described the test for the *Chapman* standard as follows: "To find the error harmless we must find beyond a

reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984 (*Song*); see *Yates v. Evatt* (1991) 500 U.S. 391, 403-404 [114 L.Ed.2d 432, 448-449].)

I do not see how the penile swab can be deemed *unimportant* on this record. Although the People's case was fairly strong, "there is no way to ever define just what quantum of evidence is necessary to convince a jury beyond a reasonable doubt of a defendant's guilt." (*People v. Accardy* (1960) 184 Cal.App.2d 1, 4.) Even where the defense is weak, that does not make the evidence that should have been suppressed unimportant. (See *People v. Scott* (1978) 21 Cal.3d 284, 295-296.) After all, the defendant had a low burden to satisfy, namely, raising a reasonable doubt in the mind of even one juror, to obtain at least a mistrial. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 518-521 [new trial motion case, concluding a hung jury is a more favorable result, and therefore a defendant need not show an *acquittal* was reasonably probable].)

Here, there was a viable defense, and there were weaknesses in the People's case. The victim gave inconsistent versions of the events leading to the alleged rape, as well as inconsistent versions of her recent sexual history. There was testimony the victim wore defendant's shorts while swimming and used the family's towels. Of the two criminalists called by the People, only one was able to identify that the sperm on the victim's underwear belonged to defendant. That same criminalist

testified as to the ease of transfer of DNA from one surface to another.

In part to rebut the possibility of contamination, the prosecutor emphasized the importance of the DNA collected from defendant's penis during closing argument and it was the DNA from defendant's penis that undermined the defense case. Although the majority opines that the victim had "no good reason" to lie (Maj. opn. at p. 11), the victim's credibility is a jury determination--a determination that in this particular case was made by a jury that had heard evidence and argument regarding highly persuasive but illegally-seized evidence that substantiated the victim's claims.

Therefore, I cannot agree that the DNA from defendant's penis was *unimportant* and "did not contribute to the verdict" as is required to show harmless error beyond a reasonable doubt. (*Song*, *supra*, 124 Cal.App.4th at p. 984.) Accordingly, I would reverse the judgment with directions to grant defendant's suppression motion.

I therefore respectfully dissent from that portion of Part I wherein the majority holds the error in admitting the DNA evidence harmless beyond a reasonable doubt. I agree with the majority's resolution of all other substantive issues raised by defendant and concur in those portions of the opinion.

_____DUARTE_____, J.